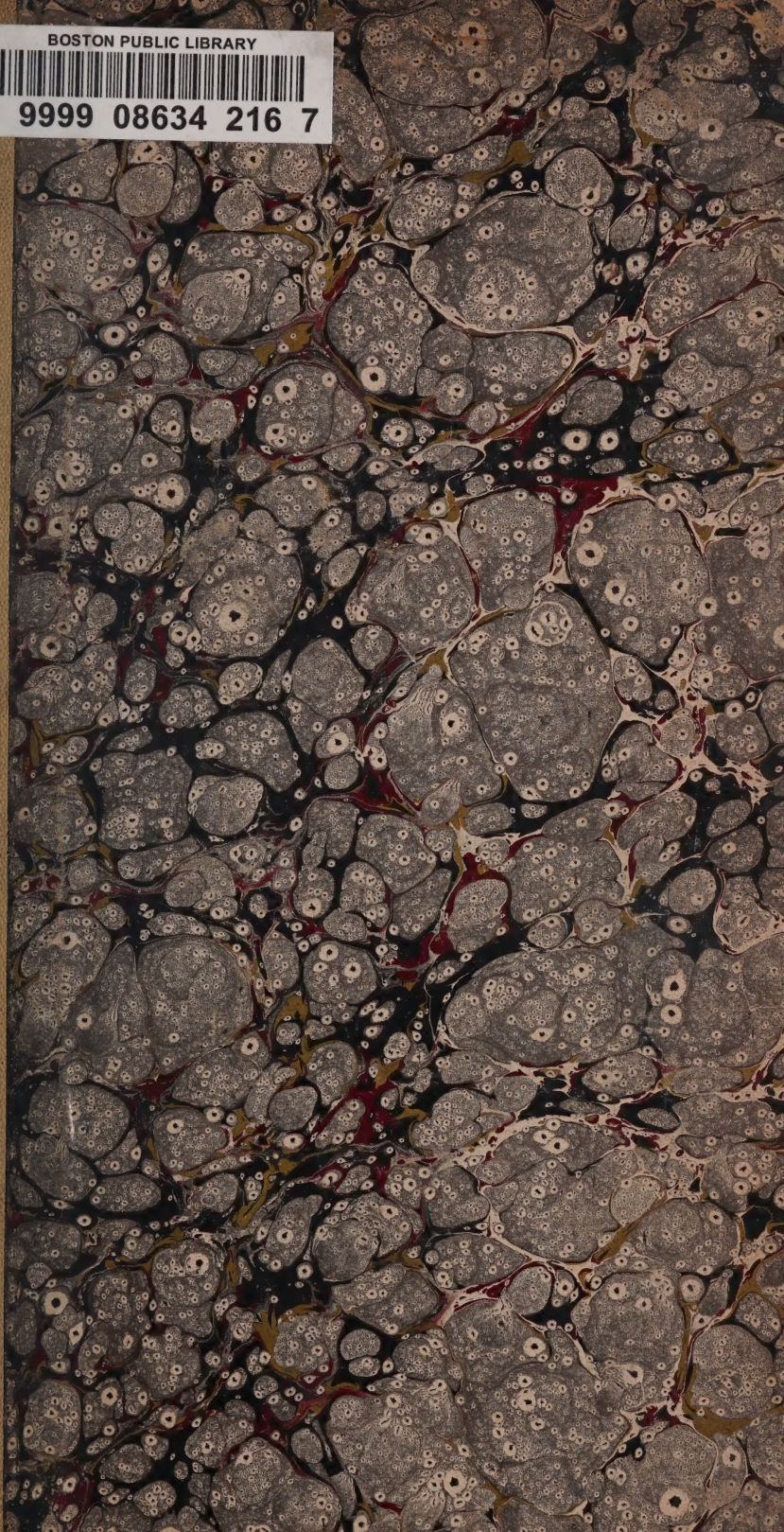


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THE

CONSTITUTIONALITY

OF

SLAVERY.

"I DO SOLEMNLY SWEAR THAT I WILL SUPPORT THE CONSTITUTION OF THE UNITED STATES."—
Form of oath required to be taken by Members of Congress, the State Legislatures, and by all
the Executive and Judicial Officers of the United States, and of the several States.

REPRINTED FROM THE MASSACHUSETTS QUARTERLY REVIEW.

BOSTON:
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CONSTITUTIONALITY OF SLAVERY.

OF the great questions which are now agitating the community not one deserves a more careful and earnest investigation, not one involves higher considerations of duty than this: Does the Constitution of the United States, when rightly interpreted, support Slavery? We propose to consider the question as briefly as is consistent with clearness.

Of course only that slavery which is legal can be constitutional. But it is argued that all slavery is illegal. Law is defined to be a "natural, permanent, *unalterable* principle;" "any rule," it is said, "not existing in the nature of things, or that is not permanent, universal, and inflexible in its application, is no law." The civil rights of men, it is contended, are defined by the "*immutable* and overruling principle of natural justice."

Justice must be either absolute or relative. An absolutely just act is just at all times, in all places, and under all circumstances. A relatively just action is just only at some particular time and place, and under some particular circumstances. Consequently, the rule of relative justice is constantly changing with time, place, and circumstances. Therefore it cannot be unalterable. On this theory, therefore, it cannot be law, because law is unalterable. Law, on this theory, then, must be synonymous with absolute justice. Without denying that it is possible for the human race ultimately to acquire a knowledge of the test of that which is absolutely just and right, it is sufficient for the purposes of our argument that it is evident that no such test at present exists.* But if law is synonymous with absolute justice, if we cannot tell what is absolute justice we cannot tell what is law; and, consequently, cannot prove even slave-holding to be unlawful. But law is a

* It seems unnecessary to argue this point. The author of this theory, strangely enough, admits the present non-existence of a test of what is naturally just. He says, "whenever the natural law is sufficiently certain to all men's minds to justify its being enacted, it is sufficiently certain to need no enactment. On the other hand, *until it be thus certain*, there is danger of doing injustice by enacting it; it should, therefore, be left open to be discussed by any body who may be disposed to question it, and to be judged of by the proper (?) tribunal, the judiciary." He therefore admits that in some cases we cannot now tell what natural justice demands of us. But if we had a test of natural justice we could decide *all cases now*.

practical science. To remain so, we cannot take our notions of relative justice as its test, and declare not to be law every rule which we believe to be unjust; because if we do this law will necessarily be constantly changing, like our notions of relative justice, with time, place, and circumstances, and it needs no argument to show that a law which is thus constantly changing, with whatever name we may please to dignify it, is only another word for despotism. We would not, however, be misunderstood. Every legislator should endeavour to make the laws carry out the highest present idea of justice. But if, as has always hitherto been the case, every legislator fails in the attempt, the laws are none the less laws although they prescribe a rule at variance with the requirement of relative justice.

This fundamental objection being disposed of, we proceed to state briefly the law of England specially bearing upon the question before us.

The common law of England (1 *Black. Comm.*, 67,) "is properly distinguishable into three kinds. 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs; which for the most part affect only the inhabitants of particular districts. 3. Certain particular laws," (the civil and canon law) "which by custom are adopted and used by some particular courts."

The existence and validity of general customs are determined by the courts. To be valid a general custom must have existed beyond the memory of man. In England this time of legal memory extends back to the commencement of the reign of Richard I. (1189.) The existence of a particular custom is proved as a question of fact, unless the court recognizes its existence. To make it valid certain things are required. Among these it is necessary that it should have existed beyond the memory of man. Thus, to establish a title by prescription to an easement, a man must be able to show that he and those under whom he claims have immemorially used to enjoy it.

The remark, "Law is a progressive science," was frequently made by the late Judge Story. It is eminently true of the common law, for it is not true that the common law has existed ever since the close of the twelfth century. Many exceedingly important portions of it, as the English law of the Road, (1 *Ib.*, p. 74, note,) the presumption of a lost grant from twenty years adverse possession of an easement, very promi-

nent portions of the law of bailments, insurance, &c., &c., have been introduced in comparatively modern times by the force of usage alone. In other words, the rule of legal memory has been practically abandoned, even in England, in very many instances; and customs notoriously originating in modern times are admitted by the courts to form as much a part of the common law as those which can be traced back to the time of Richard I. And it is well worthy of remark, that if only such principles as can be traced back thus far form part of the common law, then the rule of legal memory itself forms no part of the common law, for it was not even dreamed of until about a century after that time.

As early as the Norman Conquest, a class of slaves existed in England, called Villeins. This system of servitude was not wholly extinct at so late a period as the 12th year of Charles II. (1661) (2I b., 96; *Lloft's Rep.*, 8), though at this time we are told "there was hardly a pure villein left in the nation." Blackstone thus describes the condition of these slaves (2 *Comm.*, p. 93): "Villeins belonging principally to lords of manors, were either villeins *regardant*, that is, annexed to the manor or land; or else they were *in gross*, or at large, that is, annexed to the person of the lord, and transmissible by deed from one owner to another. They could not leave their lord without his permission; but if they ran away or were purloined from him, might be claimed and recovered by action, like beasts or other chattels. They held, indeed, small portions of land by way of sustaining themselves and families, but it was at the mere will of the lord, who might dispossess them whenever he pleased." "A villein, in short, was in much the same state with us, as Lord Molesworth describes to be that of the boors in Denmark, and which Stiernhook attributes also to the traals, or slaves in Sweden." The slavery extended to the issue if both parents were villeins, or if the father only was a villein.

"Villenage of both kinds," says Sir William Scott, "had no other origin than ancient custom." It was not established by legislation. It was lawful solely because sanctioned by general custom. None of the requisites for a valid custom were deemed inconsistent with its complete establishment. For six centuries, therefore, slavery existed in England solely in virtue of CUSTOM, UNAIDED BY LEGISLATION. But it was a relation of master and slave which the common law sanctioned. Now, if general custom alone was a sufficient legal basis for

property in white men, it was also a sufficient legal basis for property in black men. If, by the law of England, general custom, unaided by legislation, had sufficient legal power to make and keep white men and their descendants slaves, by the same law general custom, unaided by legislation, had sufficient legal power to make and keep black men and their descendants slaves. The fact that the child of the villein followed the condition of the father, whilst the child of the negro slave follows the condition of the mother, makes no difference, for the legality of villanage is not based at all upon this difference. Therefore, by the law of England, general custom unaided by legislation constituted a sufficient legal basis for slavery generally. The principle in its actual application only supported villein slavery, but it was legally capable of being applied to the support of negro slavery.

The well known case of *Somerset* (*Lloft's Rep.*, 1, &c.) is sometimes alluded to as conflicting with this view of the law, and even as settling that no legal slavery ever existed in England. In delivering the opinion of the Court of King's Bench, Lord Mansfield uses the following language: "The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory. It's so odious that nothing can be suffered to support it but positive law."

By "positive law," as here used, is sometimes understood statute law, and hence the inferences that custom, unaided by legislation, is not a legally sufficient basis for slavery, and consequently that villanage was a mere wrong, unsupported by law. It may well be doubted, however, whether by the expression "positive" law Lord Mansfield really meant "statute" law. Positive law, he says, "preserves its force long after the time itself from whence it was created is erased from memory," but we can always tell the time when a statute was passed. Besides, as Chief-Justice Shaw says, (18 *Pick. Rep.*, 212) "by positive law, in this connection, may be as well understood customary law as the enactment of a statute." Thus Blackstone, speaking of a provision of the common law, says, (1 *Comm.*, 70) "now this is positive law, fixed and established by custom." But the conclusive answer is this. If the court really intended to say that custom unaided by legislation was an insufficient legal basis for slavery, and that no le-

gal slavery ever existed in England, the decision on these points is of no binding authority as law even in England, because these points were not legitimately before the court for decision. The decision of a court of common law upon the point necessarily involved in the case before it is an authoritative declaration of the law, but its decision upon any other collateral points is wholly extra-judicial, and does not settle the law. We cannot do better than to lay before our readers the following extract from an opinion of Sir William Scott. (2 *Hagg. Adm. Rep.*, 106.)

“The real and sole question which the case of Somerset brought before Lord Mansfield, as expressed in the return to the mandamus, was whether a slave could be taken from this country in irons and carried back to the West Indies, to be restored to the dominion of his master? And all the answer, perhaps, which that question required, was that the party who was a slave could not be sent out of England in such a manner, and for such a purpose, stating the reasons of that illegality. It is certainly true that Lord Mansfield, in his final judgment, amplifies the subject largely. He extends his observations to the foundation of the whole system of the slavery code; for in one passage he says that slavery is so odious that it cannot be established without positive law. Far from me be the presumption of questioning any *obiter dictum* that fell from that great man upon that occasion; but I trust that I do not depart from the modesty that belongs to my situation, and I hope to my character, when I observe that ancient custom is generally recognized as a just foundation of all law; that villenage of both kinds, which is said by some to be the prototype of slavery, had no other origin than ancient custom; that a great part of the common law itself, in all its relations, has little other foundation than the same custom, and that the practice of slavery as it exists in Antigua and several other of our colonies, though regulated by law, has been in many instances founded upon a similar authority.”

By the decision in Somerset's case the unlawfulness of negro slavery in England may be considered as virtually settled. So far, however, was the court from even intimating its unlawfulness in the colonies, that its lawfulness is explicitly admitted both by the counsel and the court. Francis Hargrave, the eminent counsel for Somerset, said (1 *Juris. Exerc.*, 6) — “The case before the court, when expressed in few words, is this: — Mr. Steuart purchases a negro slave in

Virginia, where, by the laws of the place, negroes are slaves, and saleable as other property." Lord Mansfield said, (*Lloft's Rep.*, 17) "The now question is, whether any dominion, authority, or coercion can be exercised in this country on a slave, according to the American laws." Negro slavery was deemed unlawful in England, not because general custom unaided by legislation was legally insufficient to support it, but because it was in fact supported neither by such custom nor by legislation.

We deem it unnecessary to examine into the legality of slavery in all the states. At the time of the adoption of the Constitution, about two thirds of all the slaves were found in the four Southern states. (*Census of 1790.*) Very nearly all of these slaves were negroes and their descendants. The legality of negro* slavery in Virginia, North Carolina, South Carolina, and Georgia is, therefore, the question to which we shall confine our remarks.

The first settlers did not bring with them the whole body of the English common law, but "only that portion which was applicable to their situation." "No one will contend," says Mr. Justice Mc'Lean, delivering the opinion of the Supreme Court of the United States, (*8 Pet. Rep.*, 658, 659) "that the common law, as it existed in England, has ever been in force, in all its provisions, in any state in this Union. It was adopted so far only as its principles were suited to the condition of the colonies; and from this circumstance we see what is common law in one state is not so considered in another. The judicial decisions, the usages and customs of the respective states, must determine how far the common law has been introduced and sanctioned in each."

The colonists in their discretion could reject any portion of the common law which they deemed unsuited to their condition. This discretion was unlimited, so far as the question of negro slavery is concerned. The English courts could not control this discretion in any case, for they had no appellate jurisdiction over the colonial courts. If Parliament could, it never attempted to control it, but, as we shall see, actually fostered negro slavery in the colonies. And though the king in council could reverse a decision of the highest colonial court, yet in no instance has any such decision been reversed

* By this expression we mean not only Africans, but their descendants by the mother's side.

because it sanctioned negro slavery. Therefore, if any part of the common law of England is found to be inconsistent with "the judicial decisions, usages, and customs" of the colonies, even though these decisions and customs go to support negro slavery, we must conclude that all such parts of the English common law did not form part of the colonial common law, but were rejected as unsuited to the condition of the colonies.

The English rule of legal memory was established in accordance with the equitable construction of that statute (13 Edw. I., c. 39,) which provided that no writ of right should be maintained, except on a seizin, from the time of Richard I. It was deemed reasonable that the same length of time which was sufficient to give a title to land itself should also be sufficient to give a title to an easement over land. Upon the same principle, when the limitation of a writ of right was reduced by the statute of 32 Henry VIII., c. 2, to sixty years, a similar reduction should have been made in the limitation of the time of legal memory. This was the opinion of several eminent legal writers. The English rule being intrinsically unreasonable, as well as not conformable to the very principle on which it was originally made, was also unsuited to the condition of a new country, and consequently the colonists might reject it. In doing this they were not obliged to reject other parts of the law with which it was associated. But they might reject the rule of legal memory and adopt the law of prescription. Thus the Supreme Judicial Court of Massachusetts say, (8 *Pick. Rep.*, 510.) "The question then is, whether the courts of this country were not at liberty to adopt the English law of prescription, with a modification of the unreasonable rule adhered to by the English courts in regard to the limitation of the time of legal memory. Certainly the law without the rule of limitation might have been adopted, and the courts here had competent authority to establish a new rule of limitation suited to the situation of the country. They had the same authority in this respect that the courts in England had to establish the English rule of limitation."

If the colonists had the right thus to adopt the law of prescription, (which is nothing but a particular custom,) and change the time of legal memory, — if they had the right to declare that a particular custom of sixty or forty years' standing was legally sufficient, a fortiori, they had the right to declare that a general custom of sixty or forty years' standing was legally sufficient; or, in other words, they had a legal

right to make a general custom of sixty or forty years' standing form part of their common law. But if they had the legal right to do this, they had the legal right to *add* to their common law the legal right to do that which the courts in England have, in fact, done without lawful right; that is, incorporate into the common law customs of modern growth. The legality of this proceeding has been admitted by Parliament. By Act 7 and 8, Wm. III., c. 22, it is provided that all usages and customs in practice in any of the Plantations shall be void if "repugnant to any law made or to be made in this kingdom relative to the said plantations," thereby clearly admitting their validity if not so repugnant. That customs of modern growth have thus been legally incorporated into the common law of all the states is a fact beyond controversy. Thus many English statutes are in force in this state, solely because we have adopted them as part of our common law. (8 *Pick. Rep.*, 317.) And, if the colonists had pleased to rely on this legal right, negro slavery in the Southern colonies might now be lawful for the same reason.

From the simple fact that negro slavery was contrary to the common law of England, it is obvious that we cannot infer it was contrary to that portion of the common law which was in force in the colonies. The colonists did, however, *at first* rely wholly upon the common law principle, that general custom unaided by legislation constitutes in itself a sufficient legal basis for the relation of master and slave. They only applied the principle to their circumstances. The principle which in England was the basis of white slavery, in the colonies became the basis of black slavery. The principle remained the same, the application only was different.

It is well known that the colonists claimed the writ of Habeas Corpus* and Trial by Jury as their birthright; and it is urged that these rights are necessarily inconsistent with the existence of negro slavery. But both of them coexisted in England for centuries, legally, and, in fact, with slavery. Therefore neither of them is necessarily destructive to slavery.

The writ of Habeas Corpus was designed to put an end to *unlawful* restraint. To constitute an unlawful restraint it must be "without sufficient authority." (3 *Black. Comm.*, 127, 128.)

* The Habeas Corpus Act (Stat. 31 Charles II., c. 2) leaves all cases of unlawful imprisonment except commitments for criminal charges to the writ at common law. (3 *Black. Comm.*, 131, &c., 137, &c.) As slaves are not criminals they would be set free, if at all, by the common law writ.

This sufficient authority, says Blackstone, "may arise either from some process from the courts of justice, or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment, *or from some other special cause warranted for the necessity of the thing either by common law or act of parliament.*" Villanage was a special cause, warranted by the common law. Villeins could not leave their lord without his permission, and if they ran away or were purloined from him they might be claimed and recovered by action, like beasts and other chattels. A villein slave could not, then, be set free on this writ. The same law which provided this writ as a remedy for unlawful restraints, by declaring lawful the restraint of the villein by his lord, also declared that in the case of the villein the writ was inoperative. In like manner, wherever the general law recognizes the lawfulness of negro slavery, a negro slave cannot be set free on a writ of habeas corpus, because his restraint is lawful.

It is also urged, that if this writ does not necessarily deny the right of property in man "it would be perfectly impotent in all cases whatsoever, because it is a principle of law, in regard to property, that simple possession is *prima facie* evidence of ownership; and, therefore, any man who was holding another in custody could defeat the writ by pleading that he owned his prisoner, and by giving, as proof of ownership, the simple fact that he was in possession of him." This is evidently a mistake. Possession of a negro in any free state is not even *prima facie* evidence of ownership; consequently, if a claimant relied on possession alone, the writ would be always operative. In the slave states actual possession may possibly amount to *prima facie* evidence of ownership. But even where this is the case, if a negro can prove his freedom he is always set at liberty. The writ, therefore, does not necessarily deny the right of property in man. It is inoperative only in those cases where the restraint is recognized as lawful, it matters not whether this legality arises from servitude or any other cause.

The province of a jury at the common law is the decision of questions of fact. If the evidence is clear that A. B. is a slave, will not the verdict be in favor of slavery? How, then, can this mode of trial necessarily destroy the institution of slavery? If it is said that, in questions of freedom, the jurors will disregard their oaths and the instructions of the court as

to the law, and find a verdict in favor of freedom against evidence, the answer is, we cannot infer, from the abuse of an institution, its true character.

It is further urged, "And what (in criminal cases,) is the trial by jury? It is a trial both of the law and the fact by the peers or equals of the persons tried. Who are the peers of a slave? None, evidently, but slaves. If, then, the Constitution recognizes any such class of persons in this country as slaves, it would follow, that for any crime committed by them against the United States, they must be tried, both on the law and the facts, by a jury of slaves." Merely suggesting that slaves are not held as criminals, we would ask, have villain slaves been tried during so many centuries by juries composed of slaves, or does Magna Charta, in securing this mode of trial, say only "*nullus liber homo capiatur*," &c., "*nisi per legale iudicium parium suorum*"? Only *free* and lawful men can be summoned as jurymen, says Blackstone, and if a jurymen should happen to be "*a slave or bondman*" he may be challenged, because "*this is defect of liberty, and he cannot be liber et legalis homo.*" (3 *Black. Comm.*, 352, 362.)

The English common law, therefore, modified as the colonists had a legal right to modify it, by the alteration and rejection of some old customs, and by the introduction of such new ones as, in their opinion, were suited to their situation, might have constituted, in itself alone, a sufficient legal basis for negro slavery. But the colonists did not please to rely on this ground. They relied at first on general custom, but afterwards established and sanctioned the custom by legislative acts, clearly constitutional, clearly valid. This it is which constitutes an amply sufficient basis for negro slavery in the Southern states.*

The first negro set foot in Virginia in 1620, whilst the last charter was in existence. This charter authorized the passage of laws, "so always as the same be not contrary to the laws and statutes of this our realm of England." Neither of the Carolina charters contained any such clause. They only required the laws passed by the Assembly to be "consonant to reason,

* It seems unnecessary to consider how far the English rule of legal memory has been adhered to, abandoned, or modified in the Southern states, because, in order to prove the legality of negro slavery, we do not rely upon the legal efficacy of general custom, but on the *incontestable* validity of the provincial legislative acts, which establish and sanction the custom and stamp it with the character of law.

and, as near as may be conveniently, agreeable to the laws and customs" of England. The only charter granted to Georgia provided that the colonial legislation should be "not repugnant to the laws and statutes of England." In 1624 the Virginia charter was vacated. In 1729 the last Carolina charter was surrendered. The charter of Georgia was surrendered in 1751. With the fall of their charters all the colonies became royal provinces. If, therefore, the Charters constituted, while they lasted, the constitutions of the colonies, inasmuch as royal provinces had no charters, they had no constitutions; and, consequently, it was perfectly constitutional for the legislatures of these four provinces to establish negro slavery. Such an act was equally constitutional in Carolina, even under the charters, because the laws passed by the colonial assemblies were not obliged to conform to those of England.

Being thus unrestrained by any written constitution,* the legislature of a royal province could pass *any laws whatsoever which seemed expedient*, subject only to the negative of the king, and *possibly* that of Parliament.

In 1774 it was asserted by the Continental Congress, (*Declaration of Rights*, Act 4, 1 *Story's Comm.*, 180, note) that the colonists "are entitled to a free and exclusive power of legislation in their several provincial legislatures, in all cases of taxation and internal polity, subject only to the negative of their sovereign in such manner as has been heretofore used and accustomed." This ground was not, however, always maintained by the colonists. On the contrary, as late as 1761, the General Court of Massachusetts declared that "every

* The commission of the king to his governor is sometimes spoken of as forming the constitution of a royal province, (1 *Story's Comm. Const.*, 143, § 159.) Such commission usually contained the same clause as that relied on in the colonial charters. Hence, it may possibly be argued, that any law which would be deemed unconstitutional under a charter, would also be deemed unconstitutional under a commission which contained such clause.

But such a commission cannot be deemed a constitution, because a constitution which exists only at the pleasure of the ruler is really no constitution at all. Yet such was exactly the character of these commissions. They were issued and revoked at the will and pleasure of the king. As often as it might suit his whim, he could revoke one already granted, and annul "every clause, article and thing therein contained." He might issue a new one every month, if, of his "especial grace, certain knowledge and mere motion" he deemed it expedient. (*Stokes' View of the Constitutions of the British Colonies*, &c., 150.) He might vary the provisions of an existing commission by special instructions under his sign manual. To say, therefore, that such commissions were in any just sense of the word constitutions, or were the fundamental constitutions of the provinces, as much so as our national and state constitutions are now the fundamental laws of our government, would be to misuse language.

act we make, repugnant to an act of Parliament, extending to the plantations, is ipso facto null and void." If this parliamentary negative really existed, it constituted the *only* exception to the otherwise *exclusive* legislative power possessed by the provincial assemblies over *all* matters of *internal polity*. So far as the question under discussion is concerned, it is of no consequence whether this power existed in Parliament or not, because, so far from Parliament ever having declared negro slavery to be unlawful in these provinces, it has, on the contrary, positively sanctioned and fostered the system in all the colonies.* *Consequently, it was clearly*

* "An Act to settle the trade to Africa" (9 William III., c. 26) was passed in 1697-8. The first section recites as follows:—

"Whereas the trade to Africa is highly beneficial and advantageous to this Kingdom and to the Plantations and Colonies thereunto belonging," &c. Sect. 7, after imposing a duty "of ten pounds *per centum ad valorem*," "at the place of importation upon all *goods and merchandize (negroes excepted)* imported, in (into) England or any of his majesty's plantations or colonies in America from the coast of Africa, between Cape Blanco and Cape Mount," . . . provides, that "all *goods and merchandize (negroes excepted)* that shall be laded or put on board any ship or vessel on the coast of Africa, between Cape Blanco and Cape Mount, and shall be imported into England, or into any of his majesty's Plantations or Colonies aforesaid, shall answer and pay the duties aforesaid, and that the master or chief-officer of every such ship or vessel that shall lade or receive any *goods or merchandize (negroes excepted)* on board of his or their ship or vessel between Cape Blanco and Cape Mount, shall upon making entry at any of his majesty's Custom-houses aforesaid of the said ship or vessel; or before any *goods or merchandize* be landed or taken out of the said ship or vessel (*negroes excepted*) shall deliver in a manifest or particular of his cargo, and take the following oath, viz.;" In this oath the expression occurs "goods, wares, and merchandizes (*negroes excepted.*)"

Sect. 8 speaks of "the owner or importer of *all goods and merchandize (negroes excepted)* which shall be brought to England or any of his majesty's plantations," &c.

Sect. 9 speaks of "all *goods or merchandize (negroes excepted)*."

Sect. 20 forbids the governors, deputy governors, and judges in the colonies and all persons acting in their behalf, serving as factors "for the *sale or disposal of any negroes.*"

Trade between Africa and the American colonies was the object of this act. It is clear from sections 7 and 8 that the importation into the colonies of negroes as property was contemplated by this act. In seven instances negroes are mentioned in the same connection with "goods and merchandize." Sect. 8 obliges the owner regularly to enter at the custom-house all his *GOODS EXCEPT NEGROES*; and Sect. 20, by providing that certain high dignitaries in the colonies should not be concerned either directly or indirectly as factors, "in the sale or disposal of any negroes," necessarily implies, that all other persons in the colonies might be concerned in such business. This act, therefore, clearly sanctioned the importation of negroes into the American colonies, and the sale of them in the colonies as goods and merchandize.

It is said "that this statute implies that these negroes were to be imported into England, as well as into the plantations and Colonies in America, and that it therefore no more implies that they were to be slaves in the Plantations and Colonies than in England, where we know they could not be slaves." But

competent for a provincial legislature to pass laws establishing negro slavery; and any such law, formally passed by a provincial assembly, and formally approved by the governor

it has never yet been decided by any English court that a negro imported into England from Africa under the provisions of this act, and during its continuance, was not a slave even in England. This question is left wholly untouched by the decision in Somerset's case.

In 1732 an act, 5 Geo. II., c. 7, entitled "an act for the more easy recovery of debts in his majesty's Plantations and Colonies in America," was passed.

Sect. 4 reads as follows. "And be it further enacted, &c., that from and after the said twenty-ninth day of September, one thousand seven hundred and thirty-two, the houses, lands, *negroes*, and other hereditaments and real estates situate or being within any of the said Plantations *belonging to any person indebted shall be liable to and chargeable with all just debts, duties, and demands of what nature or kind soever, owing by any such person to his majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof*, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other speciality, and shall be subject to the like remedies, proceedings and process in any court of law or equity, in any of the said plantations respectively, for seizing, extending, *selling* or disposing of any such houses, lands, *negroes*, and other hereditaments and real estate, *towards the satisfaction of such debts, duties, and demands, and in like manner as personal estates in any of the said plantations respectively are seized, extended, sold, or disposed of for the satisfaction of debts.*"

This act recognizes and sanctions as lawful, the right of property in negroes in the colonies, and makes provision for seizing and selling such negroes for the payment of the debts of their owners.

In 1749 was passed the act 23 Geo. II., c. 31, entitled "an act for extending and improving the trade to Africa." The preamble recites: "*Whereas the trade to and from Africa is very advantageous to Great Britain, and necessary for the supplying the Plantations and Colonies thereunto belonging, with a sufficient number of NEGROES AT REASONABLE RATES; and for that purpose, the said trade ought to be free and open to all his majesty's subjects, therefore be it enacted,*" &c.

Sect. 20 provides, "But it shall not be lawful for the said Committee to carry or cause to be carried or exported from Africa any NEGROES OR OTHER GOODS, in return for the said goods they shall so export from Great Britain, or in any other manner to carry on any trade to or from Africa."

A writer in this Review says (p. 165) "negroes are nowhere in these acts spoken of as slaves." Sect. 28 authorizes "any of his majesty's subjects trading to Africa for the security of their GOODS OR SLAVES, to erect houses and warehouses under the protection of the said forts, or elsewhere in any part of Africa within the limits aforesaid, for the better carrying on of his or their trade there." The avowed object of this act was trade in negroes. — Sect. 28, in order to prosper the trade, authorizes the traders to erect buildings for the security of their "goods or slaves." Consequently this section contemplates "goods or slaves" as the objects of the trade. But as negroes were the only persons contemplated by the act as objects of the trade, this section necessarily contemplated the trade in negro slaves. Therefore the object had in view by Parliament was the supplying the colonies with negro slaves at reasonable rates. But the right to trade in slaves necessarily implies the right to buy, sell, and to hold them as slaves in the places where the trade is lawful. Therefore Parliament sanctioned in the colonies the right to buy, sell, and hold negro slaves.

Sect. 29 is relied on as showing conclusively an intent not thus to legalize the slave-trade. But this section only provides "that no commander or master

as the king's representative, until disallowed by the king, (1 *Chitty on Prerog.*, 34, 1 *Story's Comm.*, 126, § 139) was the binding law of the province, to all intents and purposes; and no court, either provincial or English, had jurisdiction to declare it void. The courts in England had no authority over the provincial courts. Appeals from the provincial courts lay directly to the king in council. In the king alone, was, therefore, centred the ultimate power over both the common and statute law of a province. His decision upon both was final. Not a single instance can be produced in which the king has reversed a decision of a provincial court, or annulled a provincial law, simply because it established negro slavery. And no power now exists capable of adjudging void a provincial law not thus annulled, even though it establishes negro slavery.

A writer in this Review, (p. 164,) however, asserts that the colonial legislatures could not make any acts contrary to the great principles of the English law; and that conformity to the law of England was still more strictly demanded in the royal than in the chartered provinces. As an example of the limits of colonial legislative authority, he refers to the act passed by the Assembly of South Carolina in 1704, by which dissenters were deprived of civil rights, and says that Queen Anne issued a proclamation declaring the act void, "because it violated that clause in the charter which required the laws of the colony not to contradict those of England."

No authority or reason is or can be given by this writer for the assertion that a more strict conformity to English law was required of royal than of chartered colonies. Notwithstanding his assertion, *it is an undoubted principle of law that, with the concurrence of the king, the assembly of a royal province was as completely unlimited in its powers of legislation over all matters of internal polity as Parliament itself*

of any ship trading to Africa shall by fraud, force, or violence, or by any other indirect practice whatsoever take on board, or carry away from the coast of Africa, any negro or native of the said country, or commit or suffer to be committed any violence on any natives, to the prejudice of the said trade." Any amount of fraud or violence might be used, and, provided it did not prejudice the legal slave-trade, the party using it would not come within the provision of this section. That the object of this section was to prevent only acts prejudicial to the trade of the company established by the act, is apparent from the consideration, that the company was to receive one half of the penalties inflicted under this section, evidently by way of compensation for an act done to their prejudice.

was in *England*; for no English or provincial court had jurisdiction to declare a provincial act thus approved void, and Parliament can pass no law without the consent of the king. If, therefore, the king saw fit to approve a provincial law directly contrary to the law of England, no power existed, either in England or the province, capable of adjudging that law void. The law to which the writer refers was passed by the assembly of a *chartered* province, and, consequently, it cannot serve as any illustration of the power of the assembly of a *royal* province. Neither could it have been declared void by the Queen, "because it violated that clause in the charter" to which the writer refers, for the simple reason that no such clause exists. The charter authorized the proprietaries, without the concurrence of the freeholders, to make ordinances "not repugnant or contrary" to the law of England. But no such restriction is imposed upon the making of laws like this of 1704, passed with the consent of the freeholders. Nor was the act of the Queen at all relied upon as being a repeal, because the obnoxious act was repealed by the colonial assembly the same year it was enacted. (2 *Cooper's Stat.*, 232, 281.) The true reason of the act of the Queen seems to be that given by the Commissioners of trade in their report to her, namely, (2 *Grah. Hist.*, 145, 146, 3 *Banc. Hist.*, 18, 19) "that the making of such laws was an abuse of the powers granted by the charter, and inferred a forfeiture of the same." In a colony where not only the most wealthy and respectable inhabitants, but at least two thirds of the whole population were dissenters, improper means were resorted to to elect Churchmen, and in an assembly in which, with all this management, the Churchmen had a majority of one only, this act, with another equally obnoxious, was passed. Such being the facts, the Queen was advised and promised to institute a *quo warranto* to obtain a judgment that the charter was forfeited, and, in the meantime, declared the act void. But, if she had pronounced it good, no power existed legally capable of declaring it void.

By invariable usage, all negroes imported into the four Southern colonies were deemed to be slaves for life, and as such were bought and sold. By similar long continued usage, the rule of the negro slave-code, that the child follows the condition of the mother, was adopted. We propose to show that these customs have been established and sanctioned in all these colonies by clearly valid statute laws. Want of room will compel us to pass over all but the more prominent of them.

In Virginia, as late as 1650, the number of negroes was so inconsiderable that to one black there were fifty whites. "An act for the Dutch and all other strangers, for tradeing to this place" was passed in 1659. This act provides, (1 *Henning's Stat.*, 540) "that if the said Dutch or other forreiners shall import any *negro slaves*, they, the said Dutch or others, shall for the tobacco really produced by the sale of the said negro, pay only the impost of two shillings per hogshead, the like being paid by our owne nation." In 1662 this act was passed: (2 *Ib.*, 170.) "Negro women's children to serve according to the condition of the mother." "Whereas some doubts have arrisen whether children got by any Englishman upon a negro woman should be slave or free. Be it therefore enacted and declared by this present grand assembly, that all children borne in this country shall be held bond or free only according to the condition of the mother."

In 1671 an act is passed, (2 *Ib.*, 288) "providing how negroes, belonging to orphans of intestates, shall be disposed of." The government of negro slaves is provided for by acts passed in 1680, 1682, and 1691. (2 *Ib.*, 481, 490; 3 *Ib.*, 86, 87.) In 1699 a duty is laid on the importation of negro slaves; and in 1705, "negro, mulatto, and Indian slaves" are declared "to be real estate." (3 *Ib.*, 193, 333.) By the act 9 George I., c. 4, § 17, (4 *Ib.*, 132) it is enacted "*That no negro, mulatto, or Indian slaves shall be set free upon any pretence whatsoever*, except for some meritorious services, to be adjudged and allowed by the governor and council, for the time being, and a license thereupon first had and obtained," &c. Stealing negro slaves is made felony in 1732. (4 *Ib.*, 324.) "An Act concerning servants and slaves" was passed in 1748. (5 *Ib.*, 547.)

Sect. 2 provides "That all persons who have been or shall be imported into this colony by sea or land, and were not Christians in their native country, except Turks and Moors in amity with his majesty, and such who can prove their being free in England, or any other Christian country, before they were shipped for transportation hither, shall be accounted and be slaves, and as such be here bought and sold, notwithstanding a conversion to Christianity after their importation."

Sect. 15 provides "that every negro or other person taken up and brought before a Justice of the Peace, and who cannot or will not declare the name of his or her owner, shall be committed to the goal of the county where taken," &c.

Sect. 25 makes it felony for any person "to steal any negro, mulatto, or Indian slave."

In 1753 "An act for the better government of servants and slaves" was passed. (6 Ib., 356.) Sections 2, 18, and 28 of this act are precisely the same as sections 2, 15, and 25 of the act of 1748. The fourth section declares "that all children shall be bond or free according to the condition of their mothers and the particular directions of this act."

Negroes were persons imported by sea or land; they were not Christians in Africa, neither were they Turks or Moors in amity with the King. None of them could prove being free in England or any other Christian country, before being shipped for transportation. Consequently, negroes were by this act declared to be legally slaves in Virginia.

The first charter of Carolina, including North and South Carolina, was granted in 1663. In 1669 the proprietaries adopted the well-known constitution of John Locke, which was not abrogated until 1693. Article 110 reads thus: — "Every freeman of Carolina shall have *absolute* power and authority over his *negro slaves*, of what opinion or religion soever."

In 1741 the provincial legislature of North Carolina passed "An act concerning servants and slaves. (*Iredell's Stat.*, 62 — 66.) This act provides,

Sect. 27, "That if any person or persons whatsoever shall, directly or indirectly, at any time after the ratification of this act, tempt or persuade any *negro or negroes, or other slave or slaves* to leave his, her, or their master or mistress's service," &c.

Sect. 29, "That if any negro or other person who shall be taken up as a runaway, and brought before any Justice of the Peace, and cannot speak English, or, through obstinacy will not declare the name of his or her owner, such justice shall, in such case," &c.

Sect. 56, "That *no negro or mulatto slaves shall be set free upon any pretence whatsoever*, except for meritorious services to be adjudged and allowed of by the county court, and license thereupon first had and obtained," &c.

Negro slavery is sanctioned also by stat. 1741, c. 8, s. 10, and stat. 1753, c. 6. (1 Ib., 50, 104.)

Five years after the abrogation of Locke's Constitution, in 1698, the colonial legislature of South Carolina passed "an act to prevent deceits by double mortgages and conveyances of lands, negroes, and chattels," &c. (1 *Grimke's Laws*, 3.)

A provincial act to prevent trading with "negroes and other slaves" was passed in 1737-8.* (1 Ib., 152.) "An act for the better ordering and governing negroes and other slaves" in this province, was passed in 1740. (1 Ib., 163.)

"Whereas in his majesty's plantations in America, slavery has been introduced and allowed, and the people commonly called *negroes*, *indians*, *mulattoes* and *mestizos* *have been deemed absolute slaves*, and the subjects of property in the hands of particular persons; &c. &c."

Be it enacted, "that *all negroes*, *Indians* (free *Indians* in amity with this government, and *negroes*, *mulattoes*, and *mestizos* who are now free, excepted,) *mulattoes* and *mestizos*, *who now are or shall hereafter be in this province*, and *all their issue and offspring born or to be born shall be and they are hereby declared to be and remain forever hereafter absolute slaves*, and shall follow the condition of the mother, and shall be deemed sold, taken, reputed, and adjudged in law to be chattels personal in the hands of their owners and possessors, and their executors, administrators, and assigns to all intents, constructions, and purposes whatsoever." The act then points out the method to be pursued in case of a suit for freedom, and it specially provides, "that in any action or suit to be brought in pursuance of the direction of this act, the burthen of the proof shall lay upon the plaintiff, and it shall be always presumed that every negro, Indian, mulatto, and mestizo is a slave unless the contrary can be made to appear, (free *Indians* in amity with this government excepted,) in which case the burthen of the proof shall lie on the defendant."

"An act to prevent the inveigling, stealing, and carrying away negroes and other slaves in this province," &c., &c., was passed in 1754. (1 Ib., 235.) The preamble reads:

"Whereas by the laws of this province negroes and other slaves are deemed to be chattels personal, and are in *every respect as much the property of their owners as any other goods or chattels are*," &c., &c.

It is, however, objected to the act of 1740 that "in reality it defined nothing; for the whole purport of it was, to declare that all negroes, Indians, mulattoes, and mestizos, except those who were then free, should be slaves. Inasmuch as no prior

* Other acts passed in 1695-6, 1711, 1712, might be cited, which were passed whilst the charter subsisted. But negro slavery, as we have seen, was perfectly allowable under the charter.

statute had ever been passed declaring who should be slaves, all were legally free ; and therefore all came within the exception in favor of free persons."

The answer is obvious, without relying at all on the legal presumption of slavery provided for by this act, all were not legally free, because prior statutes had recognized and sanctioned the custom of holding negroes in slavery, and consequently all negroes then held in slavery in accordance with this custom were declared to be legally slaves by this act.

The provincial legislature of Georgia, in 1755, passed "An act to prevent fraudulent deeds of conveyances." (*Prince's Digest*, 158.) The act reads thus :—

"Whereas many inconveniences may attend the want or neglect of recording, in the public offices of this Province, all conveyances of lands, *negroes, and other chattels*, or mortgages of the same —

"Sect. 1. Be it enacted, that all conveyances of lands, tenements, *negroes, and other chattels* or hereditaments whatsoever, or mortgages of the same, that were made before the passing of this act, shall be registered, &c.

"Sect. 2. Be it enacted, that if any vender or mortgager of lands, tenements, *negroes, or other chattels* or hereditaments within this Province, shall presume to execute a second or other deed of conveyance or sale of the same lands, tenements, negroes, or other chattels," &c.

Laws were also passed in 1765 and 1768, sanctioning the slavery of negroes. (*Prince's Digest*, 772 — 776, 160, 161.) The act approved May 10th, 1770, (Ib., 777) — entitled an "Act for ordering and governing slaves within this Province, and for establishing a jurisdiction for the trial of offences committed by such slaves and other persons," &c., —

Sect. 1 provides "that *all negroes*, Indians, mulattoes, or mestizoes *who now are or hereafter shall be in this Province*, (free Indians in amity with this government, and negroes, mulattoes, or mestizoes who now are or hereafter shall become free, excepted,) *and all their issue and offspring born, or to be born, shall be and they are hereby declared to be and remain forever hereafter absolute slaves, and shall follow the condition of the mother*, and shall be taken and deemed in law to be chattels personal, in the hands of their respective owners or possessors, and their executors, administrators, and assigns, to all intents and purposes whatsoever." After pointing out the method to be pursued in a case of suit for freedom, the act

goes on, "Provided always that in any action or suit to be brought in pursuance of the direction of this act, the burthen of the proof shall lie on the Plaintiff, and it shall always be presumed that every negro, Indian, mulatto, or mestizoe, (except as before excepted,) is a slave, unless the contrary can be made appear."

With the exception of the South Carolina act of 1698, all the laws which we have quoted were passed by the assembly of a royal province. These laws were all formally passed and formally approved by the royal governors. Many other similar laws might be cited. It seems, therefore, clear that the general custom of holding negroes in slavery has been established and sanctioned in each province by clearly valid laws. Negro slavery in the four Southern states was, therefore, lawful at the commencement of the Revolution; and up to the time of the adoption of their state constitutions.

It is urged that the Declaration of Independence was the constitutional law of the country, for the purpose of recognizing and establishing as law the natural and inalienable rights of individuals to liberty. If so, it abolished slavery.

In 1796, the Supreme Court of the United States (3 *Dall. Rep.*, 199, 231, 232) had occasion to consider the jurisdiction of Congress prior to 1781. We extract from the opinion of Mr. Justice Chace,— "It has been inquired what powers Congress possessed, from the first meeting in September, 1774, until the ratification of the articles of confederation on the first of March, 1781. It appears to me that the powers of Congress, during that whole period, were derived from the people they represented, expressly given through the medium of their state conventions or state legislatures; or that after they were exercised they were impliedly ratified by the acquiescence and obedience of the people. . . . I entertain this general idea, that the several states retained all internal sovereignty, and that Congress properly possessed the great rights of external sovereignty."

It is clear, therefore, that prior to 1781 Congress possessed no power which was not derived from the people, either by express or implied grant. Now, it is certain that the people never *expressly* granted to Congress the power to abolish negro slavery. Consequently, if such a power existed it must have been derived from *implied* grant. But the grant of a power can be implied only when the people, by acquiescence and

obedience have ratified the exercise of such power. Even if, therefore, Congress had undertaken, not by inuendo merely, but in terms, to abolish negro slavery, inasmuch as no such abolition was acquiesced in, or ratified, or indeed even suspected by the people, the act of abolition would be clearly void. The Declaration of Independence, therefore, did not abolish negro slavery in these four provinces.

This brings us down to the time of the adoption of the first state constitutions, and in order that the remainder of our discussion may be exact, we proceed to state two of the ordinary legal rules of interpretation, which are applicable alike to the interpretation of the state and national constitutions. We style them legal rules merely because sanctioned by the courts, but in these particulars law agrees with the dictates of reason.

The first rule is thus stated by Judge Story (1 *Story's Comm.*, § 451): "*Every* word employed in the Constitution is to be expounded in its *plain, obvious, and common* sense, unless the context furnishes some ground to control, qualify, or enlarge it." In case, however, it appears from the context that the words are used in this or that particular sense, a regard for truth necessarily requires of us a departure from the obvious and common meaning. Chief-Justice Marshall, in delivering the opinion of the Supreme Court, (4 *Wheat. Rep.*, 202) says, "where words conflict with each other, where the different clauses of an instrument bear upon each other and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary; and a departure from the obvious meaning of words is justifiable. But if in any case the plain meaning of a provision *not* contradicted by any other provision in the same instrument is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."

It is clear from these authorities, and the reason of the thing, that the meaning commonly attached to the words of the Constitution at the time of its adoption,* unless contradicted or controlled by the context, is to be deemed the true

* As we are to be understood to mean just what our words commonly mean *now*, so the people of 1787 are to be understood to mean by their words *then* used just what their words *then* meant.

meaning. When thus controlled or contradicted we must depart from the common meaning. But when not thus contradicted, if we are at liberty in any case to conclude that the common meaning of the words is not the true meaning, (which is very doubtful,) it must be a case where the absurdity and injustice to result from the adoption of the common meaning is so monstrous that all must unite in rejecting it. But the system of slavery itself is not yet deemed by the people of this country at large to be monstrously absurd and unjust. Consequently we have no legal right to reject the common meaning of the words, when not contradicted by the context, even though such common meaning makes the Constitution support slavery.

Two consequences legitimately follow from this first rule. Where the same word possesses a technical and a common meaning, (to use the words of Judge Story, 1 *Story's Comm.*, § 453,) "the latter is to be preferred unless some attendant circumstance points *clearly* to the former," and "where technical words are used the technical meaning is to be applied to them unless it is repelled by the context," because in each case such meaning is the common meaning of the word.

Our second rule is this. In order to ascertain the true meaning of the Constitution we are legally entitled to go into any evidence or examination which will place clearly before us the true condition of the people, their social, political, and religious institutions at the time the Constitution was adopted.

In perfect consistency with the rule of law which requires us to find the meaning of the parties to any written instrument from their words alone, this second rule allows the introduction of evidence which is simply explanatory of the words themselves, but not evidence to prove intention itself as an independent fact. The distinction is palpable. The former kind of evidence still leaves the meaning to be drawn from the words, the latter undertakes to prove that meaning as a fact without regard to the words.

This rule is practised upon by the courts constantly in the construction of wills. In the case of *Shore vs. Wilson*, (9 *Clark & Finnelly's Rep.*, 555) before the House of Lords, Mr. Baron Parke says: "I apprehend that there are two descriptions of evidence which are clearly admissible in every case for the purpose of enabling a court to construe *any* written instrument and to apply it practically. . . ." (p. 556.) "For the purpose of applying the instrument to the facts and

determining what passes by it and who take an interest under it, a second description of evidence is admissible, namely, every material fact that will enable the court to identify the person or thing mentioned in the instrument, and to place the court, whose province it is to declare the meaning of the words of the instrument, *as near as may be in the situation of the parties to it.*"

It applies also to the construction of contracts. (*Addison on Contr.*, 147.) "To enable us also to arrive at the real intention of the parties, and to make a correct application of the words and language of the contract to the subject matter thereof, and the objects professed to be described, all the surrounding facts and circumstances may be taken into consideration. The law does not deny to the reader the same light and information that the writer enjoyed, he may acquaint himself with the persons and circumstances that are the subjects of the allusions and statements in the written instrument, and is entitled to place himself in the same situation as the party who made the contract, to view the circumstances as he viewed them, and so judge of the meaning of the words and of the correct application of the language professed to be described."

It also applies to the constitution of laws. In the case of *Aldridge et al. vs. Williams*, (3 *How's S. C. Rep.*, 24) Chief Justice Taney says: "The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it when any ambiguity exists with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

And lastly, it applies to the construction of the Constitution. "In examining the Constitution," says Mr. Justice Story, (1 *Story's Comm.*, § 405) the antecedent situation of the country and its institutions, the existence and operations of the state governments, the powers and operations of the confederation, in short, all the circumstances which had a tendency to produce or to obstruct its formation and ratification deserve a careful attention. Much also may be gathered from contemporary history and contemporary interpretation to aid us in just conclusions."

It seems clear from these authorities, that to aid in attaining the true construction of any written instrument, whether it be a will, a contract, a law, or a constitution, the law, following

the dictates of sound reason, allows the admission of such evidence as will place the court or party construing the instrument *as nearly as possible in the same situation as that in which the parties to this instrument were at the time of its execution.* We are at liberty, therefore, to take into view the social, political, and religious institutions of the people of the four Southern states at the times of the adoption of their state and the national constitutions.

It is, however, argued, "that where words are susceptible of two meanings, one consistent and the other inconsistent with liberty, justice, and right, that sense is always to be adopted which is consistent with right, unless there be something in other parts of the instrument sufficient to prove that the other is the true meaning. . . . The rule of law, (it is said,) therefore, is imperative that they must be regarded in the sense consistent with liberty and right."

The only authority which is adduced in support of this position is an extract from the opinion of the Supreme Court of the United States in the case of *United States vs. Fisher et al.*, 2 *Cranch's Rep.*, 390; and in order that the question may be presented clearly, the whole paragraph is here inserted, the extract being enclosed in brackets:

"That the consequences are to be considered in expounding laws, where the intent is doubtful, is a principle not to be controverted; but it is also true that it is a principle which must be applied with caution, and which has a degree of influence dependent on the nature of the case to which it is applied. [Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects.] But where only a political regulation is made, which is inconvenient, if the intention of the legislature be expressed in terms which are sufficiently intelligible to leave no doubt in the mind when the words are taken in their ordinary sense, it would be going a great way to say that a constrained interpretation must be put upon them to avoid an inconvenience which ought to have been contemplated in the legislature when the act was passed, and which in their opinion was probably overbalanced by the particular advantages it was calculated to produce."

The court is evidently speaking with reference to the construction of a statute; consequently its language, even if cor-

rectly understood, is properly applicable only to the construction of statutes, and has no necessary bearing on the construction of the Constitution. A rule may be perfectly applicable in the construction of one and not at all applicable in the construction of the other; owing to the difference in character between a statute and a constitution. In construing the latter only one question can arise; namely, What is its meaning? whilst in construing the former we are obliged not only to find out what is its meaning, but also whether this meaning is conformable to that standard which the people have declared to be the ultimate test of legality, that is, the "fundamental principles" of the Constitution. Without, however, relying at all upon this circumstance, and supposing that the language of the court is properly applicable to the construction of the Constitution, it is sufficient for our purpose that the meaning of the court has been misunderstood.

The question is, Did the court mean to be understood as saying that where the words of the Constitution are susceptible of two meanings, that meaning which is consistent with right must be always taken unless repelled by the context; even though the other meaning is the more common meaning of the words?

The people have declared their Constitution to be "the supreme law of the land." To be this it must necessarily be uniform. It must on the same subject mean one and the same thing for ever. A protective tariff cannot be constitutional now and unconstitutional ten years hence, or war constitutional now and the reverse centuries hence. If, therefore, in any case the meaning of the Constitution is to be determined by simple reference to that which is right and just, there must be a standard which will, at least as long as the Constitution may last, proclaim one and the same rule of right and justice, otherwise the Constitution must declare different rules at different times on the same subject, and consequently cease to be the supreme law. But there is not any such fixed standard; for (as we have already seen,) absolute right and justice, if attainable, is yet unattained on earth, and the standard of relative right and justice is continually changing. This interpretation of the meaning of the court really, therefore, makes the court declare that the Constitution is not the supreme law of the land. Not only this, but it makes the court go counter to its own acknowledged and well settled principle of law; namely, that courts consider only the legal standard of morality.

The courts constantly reject the idea that they are at liberty judicially to act upon any notions of right and justice which are not sanctioned by the fundamental laws of their respective countries. Thus Lord Stowell, (2 *Dodson's Adm. Rep.*, 247) speaking of the slave-trade, says :

"I must remember that in discussing this question I must consider it not according to any *private moral apprehensions* of my own, (if I entertained them ever so sincerely,) but as the *law* considers it." . . . (p. 249.) An act must be "*legally* criminal, because neither this court nor any other can carry its private apprehensions, independent of law, into its public judgments, on the quality of actions. It must conform to the judgment of the law upon that subject, and acting as a court, in the administration of law, it cannot attribute criminality to an act where the law imputes none. It must look to the *legal* standard of morality."

In the recent case of *Jones vs. Van Zandt*, 5 *Howard's Rep.*, 231, the Supreme Court was urged in the argument to disregard Act 4, Sect. 2, of the Constitution and the act of Congress in relation to fugitive slaves, on account of the "invalidity of all laws recognizing slavery or any right of property in man." But the court said —

"Whatever may be the theoretical opinions of any as to the expediency of some of those compromises, or of the right of property in persons which they recognize, this court has no alternative while they exist but to stand by the Constitution and laws with fidelity to their duties and their oaths. Their path is a strait and narrow one, to go where that Constitution and the laws lead and, not to break both by travelling without or beyond them."

It seems, therefore, clear that the interpretation of the meaning of the court in the case of *United States vs. Fisher* is incorrect.

We have seen that negro slavery legally existed in the Southern states up to the time of the adoption of their first constitutions. Consequently, unless abolished by these constitutions either expressly or by reasonable implication, it remained legally existing. It matters not whether its legality is asserted in these constitutions or not, or whether the subject of slavery is even alluded to or not. Unless these constitutions declared slavery to be unlawful it necessarily remained as lawful after their adoption as it was before.

It was not expressly abolished by either of them. Neither

was it impliedly abolished, since they all more or less recognized its existence.

The constitution of Virginia was adopted in 1776. Among other acts of misrule recited in the preamble, George the Third is charged with "prompting *our negroes* to rise in arms among us, those very negroes whom, by an inhuman use of his negative, he hath refused us permission to exclude by law."

But King George never refused permission to exclude free negroes. He only checked the attempts of Virginia to put a stop to the introduction of negro slaves. That he did this is undoubtedly true (3 *Banc. Hist.*, 415); consequently, if the negroes thus prompted to rise in rebellion were the "very negroes" whom the king would not suffer to be excluded, they were negro slaves and not free negroes whom the king incited to insurrection. By negroes, in this clause, we must therefore understand negro slaves, and read it accordingly.

Section 7 provides "that the right of suffrage in the election of members of both houses shall remain as exercised at present."

By the ordinance of the Convention, July, 1775, (9 *Hen. Stat.*, 54) the freeholders in the different countries by law properly qualified to vote for Burgesses enjoyed this right of suffrage, except in the County of Fincastle and District of West Augusta, in which places no one but a "free white man" could be an elector. The provincial act of 1769 (8 *Ib.*, 307) defines the qualifications necessary to entitle a freeholder to vote for Burgesses. The fifth section of this act provides that not "any free negro, mulatto, or Indian, although such persons be freeholders, shall have a vote or be permitted to poll at any election of Burgesses, or capable of being elected." This section in the constitution, therefore, is to be construed as if it had in terms declared that no "free negro, mulatto, or Indian, although a freeholder, shall enjoy the right of suffrage." It therefore not only explicitly recognizes that some negroes were slaves, but also that even those who were free could not vote.

The writer before alluded to (p. 275,) refers to only one clause in this constitution. It is a very singular circumstance, but no such clause exists in the constitution. The writer quotes from a simple ordinance. (9 *Ib.*, 127.) What makes the mistake more singular is the fact that the constitution really provides (Sect. 9) that the governor "shall not under any pretence exercise any power or prerogative by virtue of any law, statute, or custom of England;" whereas this ordinance

recognizes to some extent, at least, the common law of England. He also alludes to an article in the bill of rights which declares "that all men are by nature equally free," &c., and afterwards alluding to the similar clause in our bill of rights which provides that "all men are born free," &c., seems to ask why, if the latter clause has been held to be sufficient to abolish slavery in Massachusetts, (18 *Pick. Rep.*, 210) the former clause is not equally efficacious in Virginia. The answer is obvious: our constitution *nowhere* recognizes slavery. *All* its provisions accord with the noble principle in its bill of rights. No clause in the least degree limits or controls this principle. But with the Virginia constitution the case is different. Its declaration of rights starts with the enunciation of an equally noble principle, but the constitution declares that notwithstanding all negroes are by *nature* free, by *law* some of them shall be slaves; that notwithstanding negroes "cannot by compact" deprive themselves of the enjoyment of freedom, yet still their freedom may be kept from them legally without such compact. The clauses in the two declarations cannot be compared. One is unrestricted, the other is restricted almost into nothing. It hardly means as much as the clause in the same declaration which says, "that government *is or ought to be* instituted for the common benefit, protection, and security of the people," &c.

A declaration of rights made by the representatives of the *freemen* of North Carolina was ratified Dec. 17th, 1776. It provides —

Sect. 8, "that no *freeman* shall be put to answer any criminal charge but by indictment, presentment, or impeachment;"

Sect. 9, "that no *freeman* shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court as heretofore used;"

Sect. 12, "that no *freeman* ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land;"

Sect. 13, "that every *freeman* restrained of his liberty is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same if unlawful, and that such remedy ought not to be denied or delayed."

The constitution was adopted the next day, also, by the representatives "of the *freemen*" of the state. It provides —

Sect. 7, "that all *freemen* of the age of twenty-one years who have been inhabitants of any one county within the state twelve months immediately preceding the day of any election, and possessed of a freehold within the same county of fifty acres of land, for six months next before and at the day of election, shall be entitled to vote for a member of the Senate ;"

Sect. 8, "that all *freemen* of the age of twenty-one years who have been inhabitants of any county within this state twelve months immediately preceding the day of any election, and shall have paid public taxes, shall be entitled to vote for members of the house of commons for the county in which he resides ;"

Sect. 9, "that all persons possessed of a freehold in any town in this state having a right of representation, and also all *freemen* who have been inhabitants of any such town twelve months next before and at the day of election, and shall have paid public taxes, shall be entitled to vote for a member to represent such town in the house of commons," &c.

The twelfth section of the Declaration of Rights is obviously taken from Magna Charta, (c. 29,) which also begins, "no freeman shall be taken or imprisoned," &c. But the expression in Magna Charta has always been held as against his owner to exclude a villein slave. Without, however, relying at all on this circumstance, according to the rule of interpretation before stated, the word *freeman* in this constitution is to be understood according to its common meaning, the context not pointing clearly to its technical meaning. Consequently, by prescribing rules for one part of the inhabitants as freemen, the constitution recognizes another portion to be slaves. Still, however, we shall not rely at all on this rule. Section 40 is said to prove the technical to be the true meaning of the word *free* or *freeman*. This section reads thus : "Every foreigner who comes to settle in this state, having first taken an oath of allegiance to the same, may purchase or by other just means acquire, hold, and transfer land or other real estate, and after one year's residence shall be deemed a *free citizen*." According to its technical meaning this word *free* or *freeman* is said to describe "citizens or persons possessed of franchises as distinguished from aliens or persons not possessed of the same franchises." In Section 40 it obviously cannot mean citizen, because it is used in connection with citizen, and the expression *citizen citizen* is without meaning. If it is urged that it signifies a person possessed of some franchises as distinguished from one

not possessed of them, we are at a loss, for the constitution nowhere tells us what these franchises are, the possession of which entitled a man to the appellation of free. We have no right to *surmise* "the right of suffrage and eligibility to office." But suppose these to be the franchises. It is evident that the word *freeman* did not mean a man entitled to the right of suffrage, because this right (Sections 7, 8, and 9,) was enjoyed only by that portion of the freemen which possessed certain qualifications as to residence, property, &c. If the word means a man eligible to office, we are again at a loss to know what office, the highest or the lowest, or all? But different, if not contradictory, qualifications are required for different offices. What are we to do? Suppose we understand by it eligibility to the senate or house of commons; these being offices for the choice of which the right of suffrage is most generally exercised. But the word does not signify eligibility to either of these offices. Section 5 provides that each senator shall own in his county "not less than three hundred acres of land in fee," and Section 6 provides that each member of the house shall own "in the county which he represents not less than one hundred acres of land in fee, or for the term of his own life." Now, if the word *freeman* signifies eligibility to the office of senator, it also means that the person owns in his county "not less than three hundred acres of land in fee." Putting this latter meaning in Section 7, it will speak of persons owning in their own county "not less than three hundred acres of land in fee," and who are "possessed of a freehold, within the same county, of fifty acres of land." But as the latter clause is evidently inconsistent with the former, the former cannot truly express the definition of a freeman. A similar result will be obtained if we consider the word *freeman* to mean a man eligible to the house of commons. The technical meaning of the word is, therefore, clearly repelled by the context, and the constitution, when truly interpreted, recognizes the existence of slavery.

The first constitution of South Carolina was adopted March 26th, 1776. In the preamble, among other grounds of complaint, it is alleged that the royal governors and others bearing the royal commission had "excited domestic insurrections, proclaimed freedom to servants and *slaves*, enticed or stolen them from and armed them against their masters." The same writer just alluded to states (p. 277,) that neither this constitution nor the one adopted in March, 1778, "contains a single

word attempting to legalize slavery, nor even any clause continuing in force the old colonial acts." Singular mistake! Section 29 provides "that the resolutions of this or any former congress of this colony and all laws now of force here (and not hereby altered,) shall so continue until altered or repealed by the legislature of this colony, unless where they are temporary, in which case they shall expire at the times respectively limited for their duration." But by the laws not only actually but legally in force at this time, negro slavery existed. Consequently, (these laws not being altered,) in virtue of this clause negro slavery is "continued" until abolished by the legislature.

Section 11, providing for the election of members to the general assembly, declares that "the qualifications of electors shall be the same as required by law," and "the qualification of the elected to be the same as mentioned in the election act, and construed to mean clear of debt." But by the provincial act of April 7th, 1759, (4 *Coop. Stat.*, 98, Sect. 1,) a "FREE white man and NO OTHER person," even though otherwise qualified, can be a voter. By Section 3, to entitle a man to a seat in the general assembly he is required to "have in this province a settled plantation or freehold estate of at least five hundred acres of land and *twenty slaves* over and above what he shall owe, or shall have in his own proper person and in his own right to the value of one thousand pounds proclamation money in houses, buildings," &c. Consequently this clause in the constitution is to be construed as if it declared in so many words that only *free* white men could vote, and that, to be a member of the assembly, a man must own *twenty slaves* or their equivalent in value, than which no recognition of slavery can be clearer.

The second constitution was adopted March 19th, 1778. By Section 13, a "free white man and no other person" can be an elector. This expression, "free white man," implies that some men were free who were not white, consequently the existence of free negroes. But if it implies the existence of some free negroes, it also implies the existence of some negro slaves. In confirmation of this, it should be noticed that the same expression is used in the provincial act of 1759 just alluded to, and in the same connection, that is, in defining the qualifications of voters. In this act, as we have seen, the word *free* is used as the opposite of *slave*. It is, however, urged, that the implication is equally strong that some white men were slaves. Be it so. We have not argued the legal question, but the fact

is undoubted that slaves exist at the South technically called negroes, who have as pure white complexion, straight hair, and blue eyes as any Northern woman possesses. From this class of slaves it is that many "*fancy*" girls of sixteen and eighteen years of age are culled for the New Orleans market! Judging from similar well-known historical facts, it is by no means impossible that some of the white slaves of South Carolina can trace their descent from a framer of this very constitution.*

Section 34 provides "that the resolutions of the late Congress of this State and all laws now of force here (and not hereby altered,) shall so continue until altered or repealed by the legislature of this State, unless where they are temporary, in which case they shall expire at the times respectively limited for their duration." This section has the same effect as Section 29 of the first constitution, and for the same reason, and consequently the laws establishing negro slavery are continued by this constitution until such time as they may be altered or repealed by the legislature.

The constitution of Georgia was adopted Feb. 5th, 1777. Section 9 provides that "all male *white* inhabitants of the age of twenty-one years, and possessed in his own right of ten pounds value, and liable to pay tax in this State, or being of any mechanic trade and shall have been resident six months in this State, shall have a right to vote at all elections for representatives or any other officers herein agreed to be chosen by the people at large," &c.

By this section all inhabitants not white are declared incapable of voting. The only reason which can be assigned for this denial of a right which in the preamble to this constitution is alluded to as one of the fundamental rights of a freeman, is because these persons were deemed unfit to enjoy the right. But why unfit? They are not excluded because of the presence or absence of any mental or moral qualities, but solely because they are not white. The difficulty lies in the color. This color may be in itself the impediment, or else it may imply a certain station or condition in society, which station or condition is the impediment. In itself alone it does not neces-

* Our friend Wendell Phillips, to whom we are indebted for several valuable suggestions, points out to us this case:—Salome Muller, the German woman whose suit for freedom on the ground of her not being of African blood excited so much interest some time since, has at last established her freedom in the New Orleans courts, and is now suing John F. Miller for the freedom of her children. Notwithstanding *she was white*, three trials were had before she succeeded in proving her freedom!

sarily imply the presence or absence of any mental or moral qualities. We can see no reason for excluding a man solely because he is not white, if this circumstance does not prevent his standing in other respects on terms of perfect equality with whites. We can, however, see a reason for excluding a man on account of his color, if his color necessarily dooms him to a condition unfit to be the lot of a voter. Now this was precisely the state of things in Georgia. All the inhabitants who were not white were either negro or mulatto slaves or freemen. No slave is fit to be a voter; and the exclusion of free negroes in a slave state is obviously based upon the slavery of their fellows. We can see a reason for excluding minors, but for excluding all persons not white solely because they are not white, we can see no reason which is not based upon the fact of the existence of negro slavery. If this fact is not implied we cannot account for the provisions of this section. If it is, the provision and the reasons for it become clear. Therefore we say this section implies the existence of negro slavery.

In Section 11 the expression "*free* citizen" occurs. It seems unnecessary, however, to examine this section, for if the common meaning of the word is adopted, our argument on Section 9 is strengthened, whilst if the technical meaning is adopted, our reasoning is not affected at all.

Under the articles of confederation Congress had no power which was not *expressly* given (Act 2); consequently negro slavery could not be abolished, because no power to abolish it was thus expressly given. Neither was slavery abolished by the articles themselves. The fourth article reads thus: "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the *free* inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of *free* citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce subject to the same duties, impositions, and restrictions as the inhabitants there of respectively."

By this article inhabitants are divided into two classes, those who are free and those who are not free; consequently the article recognizes the slavery of some of them. The word "free" is not used in its technical sense. Without relying in the least upon the rule as stated by Judge Story, which obliges

us to take the common meaning of the word unless the context points clearly to the technical meaning, it is evident that the word is not used as synonymous with citizen, because in the same sentence it is used in connection with citizen. If we treat it as denoting a person possessing certain franchises, what these franchises are the articles of confederation nowhere tell us. If, as before, we surmise "the right of suffrage and the right of being elected to office" as franchises, the possession of one or both of which made a man free, then inasmuch as "paupers, vagabonds, and fugitives from justice" by words of exception are classed with the free inhabitants, we are forced to the extraordinary but untrue conclusion that they enjoyed these rights. The articles of confederation, therefore, simply recognize the existence of slavery, without giving Congress the power either to control or abolish it.

This brings our examination to its last stage. We find that negro slavery legally existed in the Southern states at the time of the adoption of the federal constitution. How far, if at all, does this instrument support or countenance the institution?

Art. 1, Sect. 2. "Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of *free* persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of *all other* persons."

By this section persons are divided into those who are free and those who are slaves; for to the whole number of *free* persons are to be added three fifths of *all other* persons, that is persons not free, or *slaves*. If we adopt the plain, obvious, and common meaning of the words as their true meaning, this conclusion is incontrovertible. The rule of interpretation just alluded to obliges us to adopt the common meaning. We will not, however, rely in the least on this rule, for the word "free" cannot be taken in its technical sense. Under the expression "free persons" are *included* those bound to service for a term of years, and therefore from it are excluded those bound to service for life. But slaves, as we shall see, are persons bound to service for life. Consequently, slaves are excluded from the class of free persons, and come under the designation "all other persons." By adopting the common meaning of the word *free* we can see a good reason for *expressly* including

among the free persons those bound to service for a term of years, because we may well say that such are not wholly free persons, and therefore, if not expressly included they might be excluded from the class of free persons. But if by free persons we understand "the native and naturalized citizens of the United States," we can see no reason whatever for saying any thing about persons bound to service, for nobody would imagine that a citizen became any less a citizen by being bound to service for a term of years. It is, however, objected, that "Indians not taxed," though not slaves, are excluded from the class of free persons, and therefore the word *free* is not used as opposed to *slave*. But the truth of our construction is confirmed rather than weakened by this circumstance. As Indians not taxed were not considered as citizens, (*Story's Comm.*, § 635) if by free persons we understand citizens, the express exclusion of Indians becomes mere waste of words, it being an express exclusion of them from a position they never occupied. On our construction, however, this express exclusion is necessary, because without it they would clearly have been deemed free persons. Though really free within the meaning of this clause, they were excluded because they were not regarded as citizens, or even as aliens, but rather as persons under a kind of guardianship, (5 *Pet. Rep.*, 17, 18) who would have nothing to do with the administration of the government.

This article, therefore, recognizes slavery as explicitly as if the word *slave* itself had been used, and gives, and was intended to give, to the free persons in a slave state, *solely because they are slave-holders*, a larger representation, and consequently greater political power than the same number of free persons in a free state.

Art. 1, Sect. 9: "The migration or *importation* of such *persons* as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation not exceeding ten dollars for each person."

It is clear that this section recognizes a difference between the meaning of migration and importation, since, if both words mean the same thing, no reason whatever can be assigned why a tax is not permitted in both cases. This difference, what-

ever it is, must afford a good reason why persons imported may be taxed, and persons migrating not.

It is said that *migration* here means "simply the *going out* of persons from one of our own states or territories into another," and that *importation* is the "only word in the clause that applies to persons that were to *come into* the country from foreign nations." But this definition of migration is incorrect. Emigrants and immigrants are persons who migrate, and these expressions are and always have been applied to foreigners coming here by sea. The Declaration of Independence, when speaking of foreigners, charges the king with refusing to pass laws "to encourage their migration thither." The only definitions contained in Johnson and Walker's Dictionary (our edition is of 1834,) are "act of changing residence," "change of place," "removal;" all which expressions are equally appropriate in cases of arrivals here by sea or land. If this is the true meaning of the word, then no difference exists between it and importation as above defined. The latter is included in the former. Every case of importation of foreigners is necessarily a case of migration of foreigners. Accordingly, this section gives power to Congress to tax foreigners as persons imported, and at the same time takes the power away because the foreigner migrated hither. It is evident, therefore, that the meaning above given to importation (even if philologically allowable) is not that made use of in this section, because it inevitably leads to the conclusion that Congress has and does not have the power to tax the same individuals. The true meaning of the section seems obvious. A person who migrates does so of his own accord; he cannot be said to be migrated by any other person. He is wholly a free agent. A person who is imported does not import himself, but is imported by some other person. He is passive. The importer is the free agent, the person imported is not a free agent. Thus the slave laws of Virginia of 1748 and 1753, before quoted, begin — "all *persons* who have been or shall be *imported*," &c., &c., "*shall be* accounted and be *slaves*." Whenever we hear an importation spoken of, we instantly infer an importer, an *owner*, and *property* imported. This distinction between the meaning of the two words is then real. It affords a good reason for the restriction on the right to tax. Therefore, we say, it is the true distinction. On our construction, Congress had power to lay a tax on persons imported as property, or slaves, but had no right to tax free persons migrating.

By this clause, therefore, Congress was prevented during twenty years from prohibiting the foreign slave-trade with any state that pleased to allow it. But by Art. 1, Sect. 8, Congress had the general power "to regulate commerce with foreign nations." Consequently the slave-trade was excepted from the operation of the general power, with a view to place the slave-trade during twenty years solely under the control of the slave states. It could not be wholly stopped so long as one state wished to continue it. It is a clear compromise in favor of slavery. True, the compromise was a temporary one, but it will be noticed that Congress, even after 1808, was not obliged to prohibit the trade, and in point of fact, until 1819 the laws of Congress authorized the states to sell into slavery, for their own benefit, negroes imported contrary to the laws of the United States! (*Act Congr.* 1807, c. 77, § 4, 6; 1818, c. 86, § 5 and 7; 10 *Wheat. Rep.*, 321, 322.) So difficult does it always become to stop when once we have disregarded our clearest notions of justice, when once we have declared that to be lawful which we felt to be morally wrong!

The same writer says, (p. 284,) "there is not the slightest implication that the Constitution assented in any way that any of the persons so introduced into the states should be held in a state of slavery." But by assenting to the trade in men wherever such trade was permitted by state laws, it assented to the trade in slaves, and also assented to that end, object, and purpose without which no trade can possibly exist; namely, the subsequent barter and sale of its objects; that is, it assented to the subsequent barter and sale of the slaves, and, consequently, their continuance in slavery.

Art. 4, Sect. 2: "No person held to service or labor in one state under the laws thereof escaping into another shall in consequence of any law or regulation therein be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor may be due."

The time of holding not being limited, the expression here used must include not only persons held to service or labor for a term of years, but also those held to service or labor for life; consequently it includes those who are free persons within the meaning of Art. 1, Sect. 2, and slaves or persons held to service or labor for life.

That the expression "person held to service or labor" was

a correct definition of the condition of a slave at the time the Constitution was adopted, is evident. The sixth article of the Northwestern ordinance reads thus: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted; provided always, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid." In other words, the expression "a person from whom labor or service is lawfully claimed" so correctly described the condition of a slave, that Congress deemed it necessary to except such persons from the operation of an article relating only to slaves. In less than three months after the passage of this ordinance, this clause in the Constitution was drafted. It needs no argument to show that the expression in the Constitution means the same as that in the ordinance. "A person from whom labor or service is lawfully claimed in any one of the original states" means the same as "a person held to service or labor in one state under the laws thereof." If the former correctly described the condition of a slave, the latter did also. We can, however, see that the expression does properly describe the legal condition of a slave. A slave, though an article of property, has always and in every state been recognized as a person by being held criminally responsible for his acts. Thus the preamble to the act of South Carolina, (May 10th, 1740, 1 *Grimké's Laws*, 165,) which provides for the trial of *slaves*, recites that "natural justice forbids that any *person* of what condition soever should be condemned unheard;" and the act of Georgia of 1770, before quoted, provides for the trial of "slaves and *other persons*." The act of Virginia (1748, Sect. 15,) and North Carolina, (1741, Sect. 29,) before quoted, call runaway slaves *persons* in so many words. Similar laws might be cited if deemed necessary. A slave is also held to labor and service for life by law. Labor and service are the lot of every slave. "To *slave*" means "to toil." It is sometimes denied, but nevertheless it is true, that the law recognizes that labor and service are legally due from the slave to his master. Thus the act of North Carolina, (1741, Sect. 27,) before quoted, makes it a criminal offence to tempt or persuade a slave to leave his master's "service." "Service" is recognized as being legally due from a slave in Virginia. (Act 1691, 3 *Hen. Stat.*, 86, 87.)

The provincial assembly of South Carolina (Act 1740, Sect. 22,) provides "that if any person in this province shall on the Lord's day, commonly called Sunday, employ any slave in any work or labor, (works of absolute necessity and the necessary occasions of the family only excepted,) every person in such case offending shall forfeit the sum of five pounds current money for every slave they shall so work or labor." A similar law was passed in Georgia. (Act May 10th, 1770, Sect. 41.) These and similar laws, by providing that work and labor shall not be demanded of a slave on Sunday, recognize that on other days a master may legally demand them. That which may be legally demanded is legally due. Therefore work and labor, or service, are legally due from the slave to his master. To this labor and service the slave is held by the law. If he refuses to work, his master may coerce him. If he runs away, his master may pursue and retake him legally. He is held for life or until emancipated according to law. Consequently, the expression in the Constitution correctly describes the condition of a slave. Indeed, it more correctly describes this condition than "chattel personal" would, because it is the almost universal practice to treat a slave in many important particulars, such as dower, &c., like real property, and in some states slaves are declared by statute to be real estate.

By this section, therefore, it is provided that no person held as a slave in one state under the laws thereof escaping into another shall in consequence of any law or regulation therein be discharged from his slavery, but shall be delivered up on claim of his owner. The laws of one state, whether they support slavery or any other institution, have no power in another state. Consequently, if a slave escapes into a free state he becomes free. This is the general rule of law. In virtue of it thousands of slaves are now free on the soil of Canada. In virtue of it a fugitive slave from South Carolina would be free in this state were it not for this section in the Constitution. But this section declares that he shall not thereby become free, but shall be delivered up. Again, the Constitution makes an exception from a general rule of law in favor of slavery. It gives to slave-holders and slave laws a power which the general rule of law does not give. It enables a South Carolina slave-holder to drag from the soil of Massachusetts a person whom the general rule of law pronounces free, solely because South Carolina laws declare the contrary. It makes the whole Union a vast hunting-ground for slaves! There is not a single

spot from the Atlantic to the Pacific, from the St. John's to the Rio Del Norte, or "wheresoever may be the fleeting boundary of this Republic," on which a fugitive slave may rest, and his owner may not in virtue of this clause claim and retake him as his slave!

The same writer suggests (p. 285,) that upon the "question whether there is any lawful slavery in any of the states, . . . this clause expresses no opinion." But the mere adoption of any clause evidently amounts to the assertion of the existence of every thing necessary to render the clause operative; otherwise we must admit that the people adopted a clause with the knowledge that it was to be wholly inoperative; consequently, the mere adoption of this clause amounts to the assertion that slavery legally existed in one or more of the states, because unless slavery did legally exist this clause would be inoperative. That negro slavery did thus legally exist in the Southern states we have already seen. On this legal slavery (if no other existed,) this clause operated, and what before the Constitution was adopted was merely state slavery, under the influence of this clause, to the extent just stated, became national slavery.

Act 1, Sect. 8: "Congress shall have power . . . to provide for calling forth the militia . . . to suppress *insurrections*."

Act 4, Sect. 4: "The United States shall guarantee to every state in this Union a republican form of government; and shall protect each of them against invasion; and on application of the legislature or of the executive, (when the legislature cannot be convened,) against *domestic violence*."

All insurrections and *all* cases of domestic violence are here provided for. To constitute an insurrection within the meaning of the Constitution, there must be a rising against those laws which are recognized as such by the Constitution; and to make out a case of domestic violence the violence must be exerted against that right or power which is recognized by the Constitution as lawful. But we have seen that the Constitution admits that some persons are legally slaves; consequently, if these persons rise in rebellion or commit acts of violence contrary to the laws which hold them in slavery, their rising constitutes an insurrection. Such acts are acts of violence within the meaning of the Constitution, and consequently must be

suppressed by the national power. And what insurrections were more likely to happen and more to be dreaded than slave insurrections, and therefore more likely to have been provided for?

Slave *owners* are not the only slave *holders*. All persons who voluntarily assist or pledge themselves to assist in *holding* persons in slavery are slave *holders*. IN SOBER TRUTH, THEN, WE ARE A NATION OF SLAVE-HOLDERS! for we have bound our whole national strength to the slave-owners, to aid them, if necessary, in holding their slaves in subjection!

It is, however, urged that the Constitution requires all the states "to be republican," and that the existence of slavery is inconsistent with republicanism. By providing that "the United States shall guarantee to every state in this Union a republican form of government," the Constitution admits that every state in the Union then had a republican form of government, for to guarantee a certain form of government supposes an existing government of the form which is guaranteed. But four of these states (if no more) were slave states, consequently slavery may exist in a republic within the meaning given to that word by the Constitution.

It is also argued that the Constitution made citizens of all the people, and thereby annihilated slavery, for no citizen can be a slave. But the Constitution treats the Indian tribes as distinct independent political communities, and not as citizens. Congress entered into treaties with some of them before the adoption of the Constitution. By declaring (Act 6,) that "all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land," the Constitution adopts these treaties, and thereby declares the Indian tribes not to be citizens, for no government enters into a treaty with its citizens. (See, also, Art. 1, Sect. 8.) In like manner, by recognizing the existence of legal slavery the Constitution excludes those who are legally slaves from the class of citizens.

We here bring our examination to a close. We think we have proved *from the Constitution itself*, that the Constitution supports slavery. We might prove that its framers intended to make it just what we have described it to be, — that it was discussed and adopted as such in the conventions of the people, so far as the records of the doings of the conventions exist, — that our interpretation has been that uniformly ad-

hered to by all officers of the government, both executive and legislative, from the time the government came into being until now, — and finally, that such it has been adjudged to mean by that body which it has itself pointed out as the final arbiter of its meaning. But we prefer to pass these over wholly in silence, because it is constantly urged that we are obliged to go out of the Constitution to prove its support of slavery.

The result of “the compromises of the Constitution” has been such as might be expected. There is now less real love of freedom, not only in the nation at large but even in the free states, than there was before the Constitution was adopted.

The committee who reported to Congress “a plan for a temporary government of the Western Territory” was composed of three persons, of whom the majority, consisting of Mr. Jefferson and Mr. Chase, were from Virginia and Maryland. This plan extended to all “the territory ceded or to be ceded by individual states to the United States.” The following proviso was reported by the committee as applicable to all the territory: “that after the year 1800 of the Christian æra, there shall be neither slavery nor involuntary servitude in any of the said states, otherwise than in the punishment of crimes whereof the party shall have been convicted to have been personally guilty.” Though involving a compromise in point of time, still this was a truly noble position. The entire extinction of slavery in all the Western Territory after 1800 was the object aimed at. Not even the recapture of runaway slaves was contemplated. New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, and Pennsylvania (April 19th, 1784,) voted in favor of retaining the clause, Maryland, Virginia, and South Carolina voted against it, and North Carolina was divided. Of the twenty-three delegates present, sixteen, including Mr. Jefferson, voted in favor, seven only against it. Thus two thirds of the states and delegates present, or two thirds of the entire nation, were desirous wholly to extinguish slavery in all the Western Territory after 1800. Such was the state of public opinion in 1784.*

* In 1785 it was the same. On the 16th of March it was moved and seconded that the following proposition be committed:—“That there shall be neither slavery nor involuntary servitude in any of the states described in the resolve of Congress of the 23d of April, 1784, otherwise than in punishment of crimes whereof the party shall have been personally guilty; and that this regulation shall be an article of compact, and remain a fundamental principle of

The ordinance of 1787 was reported by a committee of five members, of whom the majority were from Virginia and South Carolina, and was adopted *unanimously* by the states present, including Delaware, Virginia, North and South Carolina, and Georgia. With the exception of Mr. Yates of New York, every delegate present voted in favor of its adoption. Unlike the resolve of 1784, the ordinance prohibited slavery *immediately*. This was an advance. But unlike that resolve it *provided for the return of runaway slaves*. This was a great compromise — the first great step in the downward path. It was the deliberate abandonment of a general rule of law in order to give greater security to slave property. True, the entire nation was united in favor of excluding slavery from what, *literally* speaking, was “the only territory to which at that time the confederacy had a joint title;” but only upon the condition that fugitive slaves should remain slaves and be delivered up. When afterwards the cessions of territory south of the Ohio were made, Congress not only did not take even this ground, but in 1790 actually accepted the cession made by North Carolina, upon this express condition, “that no regulations made or to be made by Congress shall *tend to emancipate slaves*.” Where then was the spirit of liberty which in 1784 was ready to abolish slavery after 1800 in all the Western Territory. If in 1790 two thirds of the entire nation had been (as in 1784,) willing to extinguish slavery in the territory south of the Ohio, the act would have been done, and the condition proposed by North Carolina would have been rejected, because under the Constitution, unlike the Articles of Confederation, only two thirds of the Senate and Representatives are required in order to pass a law, even against the veto of the President.

But let us take the principle of the ordinance of 1787, and see how far it has been adhered to. Do we as a nation take the same stand which was taken in 1787? Do even the people of the free states take the same stand? We answer, no! In 1819 and 1820 the question of extending slavery into the new territory west of the Mississippi came up, and instead of the nation uniting in wholly excluding it or in excluding it upon the condition of the ordinance of 1787, another compromise was made. Though the people of the free states had a

the constitutions between the thirteen original states, and each of the states described in the said resolve of the 23d of April, 1784.” On the question of commitment, 8 states voted in favor and 4 against it. Of the 26 delegates present, 18 voted in favor to 8 against it.

decided majority in the House of Representatives, Congress, (March 2, 1820,) owing to the recreancy of *Massachusetts* men, refused to require Missouri to interdict slavery in its limits, by a vote of 27 to 15 in the Senate and 90 to 87 in the House of Representatives, and finally adopted what is called the Missouri Compromise line, without even a division in the Senate, and in the House by a vote of 134 to 42. Even this compromise seems not to have been adhered to, for by act of Congress, 1836, c. 86, the western boundary of Missouri was extended over what by the compromise was to be *for ever* considered *free territory*, and *not a word is said in the act about restricting slavery*, though in the act admitting Arkansas, passed at the same session, and approved only eight days after, the Missouri compromise is referred to. It may be said that it was not necessary to *expressly* exclude slavery or to refer to the compromise act. Not so did Congress think in 1802, in 1816, and in 1818—for the people of Ohio, Indiana, and Illinois, as a condition of admission into the Union, were *expressly* required to make constitutions so as to exclude slavery. Congress did not think it safe to rely upon the provision of the ordinance of 1787, although declared to be unalterable.

The *preservation of slavery* in Texas was openly avowed by our government as a prominent reason for annexation. The joint resolution for annexation disregards even the Missouri compromise, and simply excludes slavery from such new states as may with "the consent" of Texas be formed out of its territory north of the compromise line. But without the consent of Texas thus to create new states, slavery was not to be interdicted anywhere. This resolution passed the Senate by a vote of 27 to 25, and the House by a vote of 120 to 98.* A constitution was accordingly framed establishing slavery without any limitation, and Texas was admitted as a slave state by a vote of 31 to 13 in the Senate, and 141 to 56 in the House.

The Wilmot Proviso is copied from the ordinance of 1787, and not only is it evident that the slave states repudiate it, but as yet not even the representatives from the free states have been willing to support it as a fundamental principle not to be departed from. They have never shown themselves to be so thoroughly convinced that slavery is a curse as to be op-

* The joint resolution passed the House by a vote of 120 to 98. An amendment was adopted in the Senate, and, as amended, the resolution was ordered to a third reading by a vote of 27 to 25, and was finally passed without a division. The House concurred in the Senate amendment by a vote of 132 to 76.

posed under all circumstances to its extension. Even whilst we are writing it is a matter of serious debate in the Senate — not whether the ordinance of '87 shall be extended to the territory of Oregon, — not whether the existence of slavery shall be left to be decided by the people there, — *but whether the people shall not be explicitly prevented from excluding slavery!*

Delegates from every state represented in the Continental Congress (including all but Georgia) signed the non-importation agreement of 1774, by which they bound their constituents from and after Dec. 1st, 1774, wholly to discontinue the slave-trade, and neither to be concerned in it themselves nor hire their vessels nor sell their commodities or manufactures to those who were concerned in it. Their successors, the Congress of the United States, by the acts of 1807 and 1818, (and others might be cited,) permitted the sale of freemen into slavery, and seventy years afterwards admitted Florida into the Union with a constitution which provides that the general assembly shall have *no power to pass laws for "the emancipation of slaves,"* the House, by a vote of 87 to 76, *refusing* to require this clause to be stricken out!

Not one of these acts of national degradation could have been accomplished if only the people of the free states had remained loyal to the principle of freedom. That these acts have been consummated is evidence that the spirit of freedom has decayed even in the free states. We do not hesitate to attribute this decay to the demoralizing influence of the compromises of the Constitution. Our fathers thought that they might establish justice for themselves and injustice for the slaves; that they might secure the blessings of liberty to themselves and their posterity, and at the same time hold in slavery a portion of their fellow men. They did not see that to require an oath to support these compromises from members of Congress, the state legislatures and all the executive and judicial officers of the United States and the states would either prevent real lovers of liberty from holding all these offices, or would cause the love of liberty to lessen and in time to die out. How can a man whose whole soul is filled with abhorrence of slavery conscientiously take the oath to support the return of runaway slaves? He must either at the outset disregard his clear sense of right, or his standard of right must gradually become corrupted. If he takes the oath meaning to keep it, he means to do that which from his very soul he knows to be morally wrong. If he takes it meaning to disregard it, he simply commits per-

jury. The Constitution, therefore, requires a lover of liberty to act *immorally* as a qualification for all the offices of honor and trust — state and national! Is it to be wondered at that the result is what we have described? Would it not be a cause of surprise if the nation did not have less love of liberty now than it had sixty years ago?

In order that this love may not wholly die, it is necessary to put an end to the compromises which have caused it thus to languish. It is time for all those who really wish to establish justice and to secure the blessings of liberty to their posterity, to refuse on all occasions to take this oath, and openly to declare that they ought not and will not any longer support these compromises. We may and should yield a ready support to all clauses really intended "to establish justice," but to clauses intended to countenance or support slavery our answer and unalterable resolve should be, we will yield no support whatever, but will use all just and pacific means completely to nullify them. This advice may seem to some persons as no-governmentism. Such persons cannot see that almost every right of value is supported now by state laws. Neither can they see any power beyond the ballot-box, though the votes of the people are nothing but the expression of the sentiments of the people. They do not see that this popular sentiment may be regenerated by free and continual discussion, and as effectually, perhaps, by individual repudiation of these compromises. They smile when we assure them that "truth next unto God is almighty." But we are thankful that we have faith in Milton's words. If not abolished in blood, and we trust it never will be, we believe that slavery will be ended by means of a public sentiment which will disregard all dead paper barriers in its peaceful advance towards the accomplishment of its noble end — the freedom of millions! There *is* a good time coming. Tokens of its approach are visible in the rending of churches and parties. A determination to overthrow slavery, as unyielding as can be wished, is thoroughly aroused in a large minority of the people, and it needs not the gift of prophecy to foretell what must be the result. When this result is attained, universal annexation will be truly equivalent to universal good will and peace. Nations will ask admission into our confederacy, not as now for the sake of protecting the dying institution of slavery, but to add another to the band of states which will urge each other towards the most perfect practical development of the great principles of freedom.

